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No.: **ICC-01/04-01/07**

Date: **10 July 2009**

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Redacted Version

**Fourth Review of the Decision on the Application for Interim Release of Mathieu
Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence)**

Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
 Ms Fatou Bensouda, Deputy Prosecutor
 Mr Éric MacDonald, Senior Trial Lawyer

Counsel for Germain Katanga

Mr David Hooper
 Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo

Mr Jean-Pierre Kilenda Kakengi Basila
 Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
 Mr Joseph Keta
 Mr Jean-Louis Gilissen
 Mr Hervé Diakiese
 Mr Jean Chrysostome Mulamba
 Nsokoloni
 Mr Fidel Nsita Luvengika
 Mr Vincent Lurquin
 Ms Flora Mbuyu Anjelani

Legal Representatives of the Applicants

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Mr Anders Backman

Victims Participation and Reparations Section

Other

Acting pursuant to articles 21(3), 58, 60, 61 and 64(6)(a) of the Rome Statute (“the Statute”), Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively) renders the following decision.

I. Background

1. On 17 March 2009, acting pursuant to article 60(3) of the Statute and rule 118(2) of the Rules of Procedure and Evidence (“the Rules”), and after holding a hearing as provided for in rule 118(3) of the Rules,¹ the Chamber undertook a third review² of the decision rejecting the application for the interim release of Mathieu Ngudjolo, issued on 27 March 2008 by the Single Judge (“the Decision of 27 March 2008”).³

2. That decision, issued in the pre-trial stage, was supported at that time by the following facts: 1) the condition set forth in article 58(1)(a) of the Statute continued to be fulfilled insofar as there were still reasonable grounds to believe that Mr Ngudjolo had committed crimes within the jurisdiction of the Court; 2) in view of the gravity of the crimes cited in the warrant of arrest for Mr Ngudjolo,⁴ and the possibility of a long prison sentence, there was a risk that the accused might seek to abscond from the jurisdiction of the Court; 3) Mr Ngudjolo had escaped from Makala prison in the DRC before a verdict was reached by a military tribunal in Kinshasa on war crimes allegedly committed in the town of Tchomia in May 2003, for which he was charged in the Democratic Republic of the Congo (“the DRC”); 4) there were also reasonable grounds to believe that Mr Ngudjolo was the highest ranking commander of the *Front des nationalistes et intégrationnistes* in the Zumbe area

¹ ICC-01/04-01/07-T-61-ENG ET WT 03-03-2009.

² *Third review of the decision on the application for interim release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence)*, 17 March 2009, ICC-01/04-01/07-964-Conf-Exp-tENG.

³ Pre-Trial Chamber I, *Decision on the Application for Interim Release of Mathieu Ngudjolo Chui*, 27 March 2008, ICC-01/04-01/07-345.

⁴ Pre-Trial Chamber I, *Warrant of Arrest for Mathieu Ngudjolo Chui*, 6 July 2007, ICC-01/04-01/07-1-tENG.

during the relevant period; it further appeared that he still wielded influence as a powerful figure within the DRC and, in this capacity, had maintained numerous contacts nationally and internationally, which could provide him with the connections and means to flee. In the Single Judge's view, the supporters of the accused had the means to interfere with ongoing or further Prosecution investigations and/or to put pressure on witnesses, victims and members of their families. Moreover, there were several precedents of interference with Prosecution witnesses.

3. On 2 April 2008, Mr Ngudjolo's Defence lodged an appeal⁵ against the decision of the Single Judge. On 9 June 2008, the Appeals Chamber upheld that decision.

4. On 5 June 2009, for the purposes of the fourth review of the decision, the Chamber requested observations from the participants.⁶ The Prosecutor⁷ and certain Legal Representatives of Victims⁸ replied on 12 June 2009. Mr Ngudjolo's Defence submitted its observations on 19 June 2009,⁹ arguing *inter alia* that the release of the accused could be envisaged in The Hague, subject to conditions designed to guarantee his appearance, including the obligation to present himself several times a week to the Court authorities for the purpose of signing an attendance register.¹⁰

⁵ Defence Team for Mathieu Ngudjolo, "Notice of Defence Appeal against the Decision on the Application for Interim Release of Mr Ngudjolo", 2 April 2008, ICC-01/04-01/07-356-tENG.

⁶ *Décision aux fins de recueillir les observations des participants sur la détention de Mathieu Ngudjolo Chui (règle 118-2)*, 5 June 2009, ICC-01/04-01/07-1192.

⁷ Prosecutor, "*Observations de l'Accusation relatives au réexamen de la détention préventive de Mathieu Ngudjolo Chui*", 12 June 2009, ICC-01/04-01/07-1203-Conf-Exp. See also the public redacted version, ICC-01/04-01/07-1204.

⁸ Legal Representatives of Victims a/0330/07 and a/0331/07, "*Observations des représentants légaux sur la détention de Mathieu Ngudjolo Chui (règle 118-2)*", 12 June 2009, ICC-01/04-01/07-1202.

⁹ Defence Team for Mathieu Ngudjolo Chui, "*Observations de la Défense en réponse à celles de l'Accusation et des représentants légaux des victimes relativement à la détention préventive de Monsieur Mathieu Ngudjolo Chui (Règle 118(2) du RPP)*", 19 June 2009, ICC-01/04-01/07-1219.

¹⁰ ICC-01/04-01/07-1219, para. 13.

II. The Chamber's Fourth Review of the Decision of 27 March 2008

5. In accordance with the Appeals Chamber's Judgment of 13 February 2007,¹¹ the Chamber has conducted a review under article 60(3) of the Statute and rule 118(2) of the Rules, as well as a review pursuant to article 60(4) of the Statute.

1) Review under article 60(3) of the Statute and rule 118(2) of the Rules

6. Under article 60(3) of the Statute, when reviewing a decision on interim release, the Chamber may modify that decision if it is satisfied that changed circumstances so require.

7. The Prosecutor argues that the conditions required by article 58(1) of the Statute are still satisfied in the instant case.¹² He lays particular emphasis on the risks to witnesses, the identities of most of whom have now been disclosed to the Defence, in the event of release. He maintains in this regard that the accused is able to put pressure on Prosecution witnesses and thereby interfere with the conduct of the proceedings.¹³

8. In the view of Mr Ngudjolo's Defence, the arguments relied upon by the Prosecutor and the Legal Representatives of the Victims in support of maintaining Mr Ngudjolo in detention remain unchanged.¹⁴ Mr Ngudjolo's Defence makes express reference back to the replies which it gave during the previous reviews of Mr Ngudjolo's detention, since they are, in its view, still entirely relevant. Furthermore, it opposes the argument that the proximity of the date of

¹¹ Appeals Chamber, *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"*, 13 February 2007, ICC-01/04-01/06-824, para. 120.

¹² ICC-01/04-01/07-1204, paras. 21 and 22.

¹³ *Ibid.*, para. 28.

¹⁴ ICC-01/04-01/07-1219, para. 13.

commencement of the trial,¹⁵ on which both the Prosecutor¹⁶ and the Legal Representatives of the Victims¹⁷ place such particular emphasis, might present an obstacle to conditional interim release in The Hague. It stresses that the Prosecutor has never considered that Mr Ngudjolo might agree to appear voluntarily before the Court simply on the basis of a summons to appear¹⁸ and disputes, once again, the possibility that Mr Ngudjolo might continue to exert any form of influence from his place of detention.¹⁹ Lastly, it considers that the gravity of the crimes of which he is accused cannot be a sufficient condition for systematically refusing him interim release of any kind.²⁰

9. In response to the argument by the Legal Representatives of the Victims that the DRC would not be able to guarantee the surrender of Mr Ngudjolo to the Court in the event of the lifting of his detention order and his return to the DRC, the Defence responds that such is not the case, and that the remarks made by the Congolese authorities at the hearing of 1 June 2009 concerning the review of a challenge to admissibility do not justify such a conclusion. It would, moreover, recall that Mr Ngudjolo's cooperation with the Court has always been exemplary.

10. The Chamber considers that the circumstances which served as grounds for placing, then maintaining, Mr Ngudjolo in detention have not only not changed to any appreciable extent, but on the contrary make it still more essential to assure that he will appear before the Court on 24 September 2009 at the opening of the trial.

11. The Chamber stresses that it must ensure the safety of those victims and witnesses whose identities – with the exception of two Prosecution witnesses - have been disclosed to the Defence, and that it must also ensure that there will be no

¹⁵ Ibid., paras. 10 to 13.

¹⁶ ICC-01/04-01/07-1204, para. 23.

¹⁷ ICC-01/04-01/07-1202, para. 15.

¹⁸ ICC-01/04-01/07-1219, paras. 13, 14, 17 and 18.

¹⁹ Ibid., para. 15.

²⁰ Ibid., para. 16.

obstacles to the proper conduct of the proceedings; both of those objectives could be impeded by the release of Mathieu Ngudjolo. [REDACTED]²¹ [REDACTED]

12. The Chamber also stresses, once again, that, while the gravity of the crimes cannot alone justify the refusal of an application for release, it is nevertheless a factor which cannot be underestimated, especially a few weeks before commencement of the trial. In this regard, the Chamber considers that release, whether in The Hague or to the DRC, could not, even subject to strict conditions, guarantee that Mr Ngudjolo would re-appear for trial.

2) Review pursuant to article 60(4) of the Statute

13. Article 60(4) of the Statute provides that the Chamber “shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor”. The Appeals Chamber confirmed in its judgment that “the unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case”.²² In order to determine whether the period of detention of Mathieu Ngudjolo prior to the trial is unreasonable or not, the Chamber must therefore take into account all the circumstances of the instant case.

14. As Pre-Trial Chamber I recalled in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, in order to assess the unreasonableness of detention, it must be determined whether the requirement of public interest takes precedence over the principle of respect for individual liberty.²³ In the instant case, the Chamber considers that the public interest requires that Mathieu Ngudjolo be kept in detention, given the

²¹ [REDACTED]

²² ICC-01/04-01/06-824, para. 122.

²³ Pre-Trial Chamber I, *Second Review of the “Decision on the Application for Interim Release of Thomas Lubanga Dyilo”*, 11 June 2007, ICC-01/04-01/06-924; European Court of Human Rights (ECHR), *W. v. Switzerland*, Judgment of 27 June 1993, Application No. 14379/88, para. 30; ECHR, *Ilykov v. Bulgaria*, Judgment of 26 July 2001, Application No. 33977/96, para. 84.

absolute necessity of guaranteeing his appearance at trial and of ensuring the protection of victims and witnesses.

15. Between the first status conference, held on 27 and 28 November 2008,²⁴ and the present Decision, the Chamber has actively prepared this case for trial. It has held several public and *ex parte* hearings, rendered numerous decisions relating in particular to the disclosure of incriminating and exonerating evidence to the Defence, and a date has now been set for the commencement of the trial. Furthermore, the Defence does not attribute any blame to the Prosecutor for the delays in the proceedings. Mr Ngudjolo's detention cannot therefore be considered as having been prolonged unreasonably, and the Prosecutor cannot be accused, in present circumstances, of causing an inexcusable delay within the meaning of article 60(4) of the Statute.

²⁴ Order Fixing the Date of a Status Conference (rule 132 of the Rules of Procedure and Evidence), 6 November 2008, ICC-01/04-01/07-739-tENG.

FOR THESE REASONS,

The Chamber **REJECTS** the application for release submitted by the Defence in its observations and **DECIDES** to maintain Mathieu Ngudjolo in detention.

Done in both English and French, the French version being authoritative.

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed 10/7/09]

Judge Hans-Peter Kaul

Dated this 10 July 2009

At The Hague, The Netherlands